SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE, NO. 00-319,

Supreme Court No.: SC00-2510

JOSEPH P. BAKER
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JOSEPH P. BAKER'S REPLY TO THE JUDICIAL QUALIFICATIONS COMMISSION'S REPLY TO BAKER'S RESPONSE TO ORDER TO SHOW CAUSE

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TABLE OF AUTHORITIES

Cases and Other Authorities:

I. The JQC Reply, Canon 3B(7) and Due Process of Law

The JQC's position in its Reply brief is that all scientific or technical knowledge relevant to cases pending before a judge received out of court is fruit of the forbidden tree under Canon 3B(7). The logical extension of this position is that there is no proper way a judge can pursue knowledge about scientific or technical subjects outside the courtroom without denying the parties due process of law.

This is a novel and unsupported position, and the Reply Brief cites no precedent for a disciplinary proceeding against a judge who seeks to inform himself on relevant technical matters during a jury trial. Indeed, the JQC has not even cited a case in which a judge in a jury trial was reversed for that. The JQC cites several cases in which a judge was reversed in nonjury cases for independently obtaining information without giving counsel notice and an opportunity to be heard, but no disciplinary action was obtained in those nonjury cases. The legal authorities cited by the JQC are precedent for treating this as judicial error, at most, and not misconduct.

The Formal Charges against Judge Baker alleged: "In your Memorandum [of Ruling] explaining your decision, you disclosed for the first time that you had made these inquiries." It is undisputed that this is not true and that the same disclosure in the Memorandum of Ruling was made in the draft delivered in court during trial on May 14, 1999, two months before the Memorandum of

Ruling, and four months before Judge Baker entered his ruling in his Final Judgment on September 20, 1999. The JQC makes no mention of this complete failure of proof on these charges, and instead cites some cases in which judges were reversed — not disciplined — for independent inquiries in nonjury cases, and the reversal was based on denial of due process.[1] *See* Reply Brief at 13-14. These cases do not support the notion that Judge Baker should be sanctioned; at most, they are authority for appellate reversal and provide no guidance in a disciplinary setting.

The JQC's Reply Brief raises a pending case before the Supreme Court of Florida, *Vining v. State*, Case No. SC99-67. Judge Baker reiterates that the matter raised here was also raised by Vining in his initial appeal. In *Vining* as well as in *UBS v. Disney VC*, Judge Baker was the judge in a jury trial, and he gave written notice to the attorneys and an opportunity for them to be heard about information he received outside of court. This Court upheld Judge Baker's actions in *Vining v. State*, 637 So.2d 921 (Fla. 1994),

[1]Another failure of the JQC was to show that Judge Baker's actions impaired the confidence of the public in judges. The JQC presented no evidence on this matter, and in its brief, the JQC seems to argue that this element can be assumed, by repeatedly stating that it is "clear" that this is the case. The JQC states, for example, that "[t]here can be little doubt that improper communications by a trial judge impairs [sic] the integrity of the judicial system," and then cites a case in which the judge engaged in fact-finding about the truth of a witness's statements, which is inapposite to the case at bar. Reply Brief at 11-12.

based on the written notice and opportunity to be heard to counsel.[2, 3]

What the JQC has not adequately explained in its brief is the fact that it provided no evidence establishing impropriety by Judge Baker. At the hearing before the JQC, the witnesses for Judge Baker were three. Judge Baker testified to his interpretation of the Canon in light of the Code of Judicial Conduct emphasis on judicial independence and Federal Rule of Evidence 201 being a proper guide. Judge Charles Scott agreed with Judge Baker's

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[2]The Florida JQC now seems to suggest that this Court should revisit its decision in that case. We decline to make any comment on the pending proceeding raised by the JQC since it could be construed as an ex parte communication to this Court about a current case.

[3]The JQC also raised *Pokey's Nurseries v. Conner* case, which involved a very complex, technical issue of plant pathology that had led to the state's misdiagnosis of citrus canker in plant nurseries, which in turn led to destruction of hundreds of millions of dollars of citrus nursery plants. Judge Baker was faced with wedding plant pathology and DNA testing for diseases (in one of the earliest uses of DNA during the early 1990s) with police powers in a suit for inverse condemnation by a nursery owner. As in *UBS v. Disney,* Judge Baker made inquiries of highly qualified experts in the fields, and gave the parties notice of this in writing and an opportunity to be heard. As in *UBS v. Disney,* Judge Baker filed a lengthy Case History (Baker Ex. 1) before ruling. As Judge Baker testified, and the JQC acknowledges, Judge Baker gave the parties an opportunity to participate in his research, but more importantly, he filed his findings in writing and asked for comment before he made any rulings. Unlike in *UBS v. Disney*, the parties did comment and made corrections to Judge Baker's analysis of the case, which is why this is an Amended Case History. As the JQC acknowledges, Judge Baker was commended for this research and this Amended Case History in the concurring opinion of MacDonald, J., *Dept. of Agriculture v. Polk*, 568 So. 2d 35 (Fla. 1990).

interpretation and application of the Canon as did Professor Amy Mashburn, a Professor of Ethics at the University of Florida's law school. The JQC witnesses = zero. Below it will be demonstrated from the authorities of reported cases, law review commentaries, academia, nobody, but NOBODY agrees with the JQC's position on the canons, and it has been established indisputably by this point in the proceedings that there is no case in the United States sanctioning a judge in similar circumstances.[4]

One judge who was challenged about his research, attending educational programs and inquiries on a scientific subject responded in *United States v. Bonds*, 18 F.3rd 1327 (6th Cir. 1994). Attorneys Barry Neufeld and Barry Scheck, who gained national notoriety as expert counsel on DNA for O.J. Simpson, raised the same claim about judges that the JQC is now asserting in a motion to recuse Judge Boggs of the 6th US Circuit Court of Appeals. The motion asserted that Judge Boggs had attended a 1991 conference on the forensic use of DNA. Attorneys Neufeld and Scheck's client, the appellant, had been convicted of murder largely on DNA evidence, and their motion for disqualification asserted that during the 1991

[4]The architectonic of our court system is most clear in jury trials. Jurors have exclusive power to decide their cases, and jurors are qualified by disinterest and lack of relevant knowledge. Relevant expertise may disqualify a juror. Jurors are prohibited from doing any research or investigation outside of court. This preserves control of the evidence in the parties and their attorneys. In this proceeding the JQC is asserting, in effect, that judges are under the same prohibitions as are jurors.

conference Judge Boggs had listened to presentations from scientists on DNA, including some who were government witnesses. They accused Judge Boggs of having informal discussions with these forensic DNA scientists on the subject of DNA. Furthermore, before the conference, Judge Boggs had sought out a college classmate for a discussion of the method of DNA comparison. In short, Judge Boggs educated himself about DNA — outside of court.

Note well, the issue was whether Judge Boggs should recuse himself in the case, not whether he should be censured or removed from office or sanctioned in any fashion. Judge Boggs wrote:

> To summarize, the allegation is that, with apologies to Chesterton and Hitchcock, I am "The Judge Who Knew Too Much." Without necessarily agreeing that the characterization is correct, I believe that the law is clear that a judge's interest or expertise in a given area, or his methods of informing himself as to a given area of the law, do not constitute grounds for recusal unless they come within some other, specific grounds for recusal.
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> * * * *
>
> [A] judge should never be reluctant to inform himself on a general subject matter area, or participate in conferences relative to any area, or participate in conferences relative to any area of the law, for fear that the sources of information might later be assailed as "one sided." Just as a judge's personal reading list is not subject to monitoring and condemnation on that basis, neither is the speaker's list at a conference that the judge may attend.

Id. at 1328-29. If the charges against him were successful, Judge Boggs noted that:

> [W]e would all be required to cancel our subscriptions to law reviews and newspapers, let alone specialized journals of any sort.
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> * * * *

> To the extent that a judge remains interested at all in the events of society, a judge will inevitably be exposed to matters relating, in greater or lesser degree, to interesting areas of the law on which the judge may be called to rule. However, such general knowledge does not constitute extra-judicial knowledge of disputed evidentiary facts.

Id. at 1331.

No reported opinion is factually more analogous to Judge Baker's case. Judge Baker was confronted with a novel and technical issue of applying contract damage law to computer programming in a jury trial. Like Judge Boggs, Judge Baker researched extensively to make the most informed decision he could make on these legal issues. Since it was a jury trial, Judge Baker knew that he could make only legal decision, and that the jury had the sole and exclusive duty to decide the facts. He believed he was acting in the highest and best traditions of judges by advising counsel and the parties in open court on several occasions beginning over four months before making his legal rulings on the sufficiency of the evidence of what he had found out from inquiries that were part of his decisions on the law.

The 5th DCA opinion raises the question without deciding it of whether Judge Baker violated Canon 3B(7), which was the first time that Judge Baker knew somebody had asserted he violated a canon. He had no opportunity, of course, to be heard before the 5th DCA on this issue. In fact, it appears, based on a review of the briefs, that the 5th DCA was <u>not</u> informed of his written and oral

disclosures to counsel during trial, and was perhaps left with the impression that Judge Baker's first disclosure to the parties and their lawyers about his research came in his Memorandum of Ruling. If that is the case, the 5th DCA's decision was understandable.

Judge Jack B. Weinstein begins his article entitled *Limits on Judges Learning, Speaking and Acting – Part I – Tentative First Thoughts: How Many Judges Learn?*, 36 Arizona Law Review 1994, thus:

> This is my beginning and tentative exploration of the strange terrain where epistemology and judicial ethics overlap.

Id. at 539. "Epistemology" is the word that covers the study of knowing — how and what someone can come to know. Judge Weinstein's article calls upon his personal experience and that of other judges, as well as exhaustive research on how and what judges can come to know about cases before them. As to Judge Baker's reliance on Federal Rule of Evidence 201 as a guide, Judge Weinstein agrees:

> Judicial notice can be relied upon. Care needs to be taken that both sides are informed to prevent misconceptions by the court. This is particularly true as to facts. In the Swine Flu cases, Judge Sherman G. Finesilver attended medical school classes for background. In the Agent Orange case I have read widely, but I have filed and docketed everything I read bearing on dioxin, even newspaper stories.

Id. at 556. Judge Weinstein has these cautions:

> More care and discretion by the judge needs to be shown if the knowledge is being acquired for a specific case. Here it is important that all sides be informed as soon as possible about what the judge is reading, hearing or seeing.

Id. Judge Weinstein is emphasizing the same fundamental requirements that Judge Baker does, and that is that the judge must disclose any information acquired. Judge Weinstein also writes:

> The key in this area is openness and balance. Whenever possible, materials and notices of work and studies should be filed and docketed or announced at sessions with the attorneys and experts. Parties must have the opportunity to counter these extra-judicial sources of knowledge.

Id. at 560. Judge Baker met this prescription in spirit --- by announcing the information he had received in open court in the presence of attorneys and parties --- and also to the letter, by making the disclosure twice in writing delivered to the attorneys before entering his legal rulings, inviting them to provide any argument or authority.

Judge Baker recognizes as does Judge Weinstein that there may be concerns about a judge who educates and informs him or herself, and this requires candid, prompt and open disclosures to all affected before ruling and providing an opportunity to all to counter or correct what the judge has learned about a science or technology. Regarding concerns about a judge's conscientious self-education, Judge Weinstein notes:

> Risk-for-risk, however, a thinking, informed judge is far less dangerous than one pickled in his own, ever-so-ethical views.
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> * * * *
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> Judges should be impartial and unbiased. Two different models exist to achieve these traits. The first model -- judges living in a hermetically sealed granite tower with no outside influences of any kind -- is unrealistic and

> unwise. That leaves use with a second model -- judges who require a knowledge of the real world.

Id. at 562, 565.[5] This hermetically sealed granite tower of which Judge Weinstein speaks is exactly what the JQC would have this Court construct.[6]

John Monahan and Laurens Walker have written several works recognizing the distinction found in the commentary to Federal Rule of Evidence 201 of "legislative facts," which are the necessary province of the judge in the judge's law making by judicial rulings, distinct from the jury's role in deciding "adjudicative facts." Legislative facts include empirical and social science that judges may search for and research for themselves. *See* John Monahan and Laurens Walker, *Judicial Use of Social Science Research*, 15 Law & Hum. Behav. 571 (1991), and John Monahan and Laurens Walker, *Social Science in Law: Cases and Materials* (3d ed. 1994).

George Marlow cites, approves and endorses Monahan and Walker as well as Judge Weinstein's article in his article *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua*

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[5]To prevent conflicts between these views Judge Weinstein suggests a number of solutions, most of which are designed to minimize ideological or partisan bias in private, public and professional judicial educational programs. In case-specific situations, of a judge's research, inquiries, self-education, Judge Weinstein recommends that "the judge should inform the parties of fact discovery and consultations outside the record." *Id.* at 565. Of course, in the case at bar, Judge Baker complied with this dictate scrupulously, providing ample and timely notice.

[6]This granite tower sounds remarkably similar to Plato's Cave, as noted by Judge Baker in earlier memoranda in this case.

Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process, 72 St. John's L. Rev. 291 (1998). In Marlow's description of his article, he states:

> [T]he core issue of this article is joined: may judges, while a case is pending or impending, and as part of the decision-making process, ethically engage in independent library or internet research, sua sponte and ex parte, to uncover, review, and consider legislative facts, social framework evidence, and other social, scientific and technological studies that affect the outcome of a case but are not adduced by the parties to the litigation?

Id. at 293. Judge Marlow limits his article to the Code of Judicial Conduct, and his article underscores just how novel is the JQC's interpretation in this case:

> Indeed, I contacted the federal and all of the thirty-nine state judicial ethics advisory committees, and received a response from a majority of the committees. From those responding, there appear to be no ethics opinions written by any of them regarding this article's core issue.

Id. at 302. Judge Marlow identifies the problem of a judge's independent research this way:

> [T]he dangers posed by receiving such information – either <u>secretly</u> from a library or the internet, <u>secretly</u> from other persons, or <u>secretly</u> from independently investigating facts in some other way – are all the same. All methods can profoundly affect a judge's opinion and decision and can unquestionably deprive an unsuspecting litigant of the right to know what the judge has learned and an opportunity to respond and be heard.

Id. at 323 (emphasis added). Repetition of the word "secretly" shows it is the operative word, and it underscores the paradox of these proceedings against Judge Baker, because, of course, there was nothing "secret" about what Judge Baker did.

These notions of secrecy and candor are interesting in light of the JQC's speculation that the matters heard below are the "tip of the iceberg" as to Judge Baker's activities in doing independent research regarding cases. That is an odd simile.[7] What is distinctive about icebergs is that more than 95% of their mass is hidden below the sea in which they float. With Judge Baker, there is nothing hidden. His iceberg, if we call it that, floats entirely above the water, where it can be seen clearly by everyone involved, because the evidence shows that Judge Baker has given notice and an opportunity to be heard in every instance in which he received relevant information regarding a case before him as a judge.

This notice and disclosure issue is also addressed by other states, as noted by Marlow in his article:

> Oregon's Code of Judicial Conduct Rule 2-102(D), through a catchall provision, requires a judge to "promptly disclose to the parties any communication not otherwise prohibited by this rule that will or reasonably may influence the outcome of any adversary proceeding." That sentence captures the essence of the universal goal of contemporary state and federal judicial ethics codes on the subject of ex parte communications – that is, to assure all litigants procedural due process.

Id. at 323. Judge Marlow quotes another judge to underscore the point:

> In an article analyzing the use of social science evidence at trial, Judge Joseph A. Colquit emphasized that notice and an opportunity for challenging scientific

[7]In addition to being odd, it is also an improper argument to suggest that matters not before this Court could justify punishment of Judge Baker here.

> evidence is critically important since our justice system relies principally on an adversarial exchange designed to act as a filtering process for incoming evidence, mostly by way of cross examination.

Id. at 328.

Judge Marlow also considers the timely issues of the *Daubert* and *Frye* tests of admissibility for scientific evidence. Judge Marlow writes:

> In order to treat "well supported" scientific research and case law as equal forms of precedent, the justice system would have to create a reliable and relatively convenient procedure to determine which research material is indeed "well supported" and which is not. Plainly, to this writer at least, this determination must provide a meaningful opportunity for the participation of the parties in order to be consistent with due process requirements.

Id. at 332-33. The inter-relationship between research, judge education and these admissibility issues was the subject of expert testimony at the hearing below.

II. Frye, Hadden v. State, District Court Split

Professor Mashburn testified during the JQC hearing about how this question of judges acquiring knowledge on technical and scientific subjects is a lively and current issue in Florida. District court opinions on the subject express anguish and uncertainty revolving around two traditional considerations: first, due process requires making the parties aware of the scientific materials being considered by the court in making its decision, which limits judicial research and inquiry outside of court; second, there is the concern that the record reflect all of the

materials being considered by the court in making its decision on the credibility and reliability of the scientific principles being advanced so as to permit review of the judicial decision on a scientific subject as any other subject that arises during litigation.

In *Hadden v. State*, 690 So.2d 573 (1997 Fla.), this Court held that "the appropriate standard of review of a *Frye* issue is de novo," and that before introduction of expert testimony "the trial court must find that the expert's testimony is admissible under the standard for admissibility of novel scientific evidence announced in *Frye* and adopted in Florida." *Id.* at 579, 581 (citations omitted). *Brim v. State*, 779 So.2d 427 (Fla. 2d DCA 2000), identifies a problem in the *Hadden* decision this way:

> The supreme court has instructed this court to conduct a *de novo* review of the trial court's order, describing such a *Frye* "determination" as a question of law. In this *de novo* review, we are to examine "expert testimony, scientific and legal writings, and judicial opinions" to decide whether the scientific principles and procedures relied upon to create such evidence are generally accepted by a relevant scientific community both at the time of trial and today.
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> After considerable research and deliberation, this court concludes that the hearing on remand was insufficient. Moreover, because we are not adopting a rule of evidence in a rule-making proceeding, but are making a case-specific determination affecting Mr. Brim's liberty interest, we further conclude that due process requires specific constraints upon this unusual *de novo* review. Although the supreme court described this *de novo* review as addressing an issue of law, our experience with this review convinces us that this "determination" is actually a mixed question of fact and law.
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> * * * *

> As we explained at the beginning of this order, we have struggled for nearly a year with our authority and competence to make a *de novo* "determination" regarding the general acceptance of a very technical, complex scientific procedure within some unspecified scientific community. We do not quarrel with the need for a healthy and thorough independent review by an appellate court of a *Frye* determination made by a trial court. However, both due process and the limited technical competence of the judiciary require that this review take place with certain safeguards that we have not yet provided.

Id. at 428, 435. Then came *United States Sugar Corporation v. Henson*, 787 So.2d 3 (Fla 1st DCA 2001). In response to the 2nd DCA opinion in *Brim v. State*, the 1st DCA said this:

> We share Judge Altenbernd's concerns with an appellate court undertaking a *de novo* review not only based upon the scientific literature considered by the lower court or submitted by the parties on appeal, but also based upon literature outside of the record. Nevertheless, we read the Florida Supreme Court's opinion in *Brim v. State* as requiring such an undertaking for this court to reach a *de novo* determination of whether there is general acceptance within the relevant scientific community of the novel science before us. Further, the issue of general acceptance is to be made at the time of appeal, rather than the trial.

Id. at 15 (emphasis added, citations omitted). The problem being posed of considering literature and other outside-of-court information is particularly acute since it is an appellate court, which does not have the face-to-face opportunity to bounce off counsel what it has learned.

However this problem ultimately is resolved among the appellate courts of Florida, for a trial judge, there is a simple answer to both of these concerns. It is the method adopted by Judge Baker, which was to follow the judicial notice procedure of Federal

Rule of Evidence 201. That rule dissolves all concerns about due process and appellate review for a trial court evaluating a scientific thesis under either *Frye* or *Daubert*. Under this rule, the judge is unrestricted in his or her examination of scientific materials and sources, but whatever is being considered by the judge must be disclosed and made a part of the record, giving counsel a full and fair opportunity to counter or explain it. That is precisely what Judge Baker did, and he did so to avoid the problems that have troubled the DCA's.

Under the circumstances of this case the communications of Judge Baker are not prohibited by Canon 3B(7), and if this Court so holds, then many judges, including the Florida appellate judges quoted above, who believe they must look outside the record in making *Frye* determinations, are similarly guilty. Surely such a result is neither required here, nor generally advisable.

CONCLUSION

This case should be dismissed and costs awarded to Judge Baker.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the a copy of the foregoing has been furnished by U.S. Mail delivery to *Judge James Jorgenson*, Chairman of JQC Hearing Panel, The Historic Capitol, Room 102, Tallahassee, FL 32399-60000; *Thomas C. MacDonald, Jr., Esquire*, General Counsel to JQC, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; *Brooke S. Kennerly*, Executive Director, Florida JQC, 400 S. Monroe, Old Capitol, Room 102, Tallahassee, FL 32399; *John R. Beranek, Esquire*, Counsel to the JQC Hearing Panel, P.O. Box 391, Tallahassee, FL 32302-0391; and *Charles P. Pillans III, Esquire,* The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202, this 23rd day of August, 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that I have complied with the font requirement and used 12-point Courier New.

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